and that, far from applying the rule that a surety's obligation is *"strictissimi juris"*, the courts should have subjected him to the opposite rule of insurance law, that the contract is to be construed strictly against the insurer.[24]

STOCKHOLDERS' INDIVIDUAL LIABILITY AND THE CONFLICT OF LAWS.—The assumption that the common law relation between the fictional corporate entity and its stockholders and creditors is substantially a contractual one,[1] though not free from inconsistencies,[2] is nevertheless very close to the truth, and it is well established that the resulting obligations are enforcible, under principles of comity, beyond the borders of the state of incorporation.[3] The law of the domicil, it is said, fixes the rights and liabilities of the parties to the corporate agreement. But although there is secured by incorporation a limited liability in dealings with strangers, nevertheless this liability remains inherently consensual whether the extent of the limitation granted by the charter be very considerable,[4] as it usually is, or, as in the case of a so-called unlimited liability corporation, practically insignificant.[5] In either case, the nature of the liability is the same, since it simply consists of what remains after the scope of the limitation has been determined. It seems further that the quantum of exemption conferred, depending as it must upon the legislative intent, may be defined and fixed by the charter or enabling act interpreted either by themselves or in connection with any existing provision of the statutory or organic law.[6] This conclusion seems logically unassailable, for a general statutory or constitutional provision, as an expression of the legislative will, cannot be less effectual than a special charter or enabling act. Neither one is either clearer or less clear than the other, and accordingly the operation of a statute of the domicil providing for unusual individual liability, is simply to confer upon stockholders, in corporations subsequently formed, a slighter exemption from liability than they would otherwise have had. Such appears to be the ultimate significance of the familiar statement that the general law of the domicil enters into the corporate charter; but in spite of the universal

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[24]Walker *v.* Holtzclaw (1899) 57 S. C. 459; Tebbetts *v.* Merc. Cr. Guar. Co. (1896) 73 Fed. 95; Pittsburgh etc. Co. *v.* Keokuk etc. Co. (1901) 107 Fed. 781; Bank of Tarboro *v.* Fidel. and Dep. Co. *supra;* Guarantee Co. *v.* Mechanics' Sav. and Tr. Co. (1896) 80 Fed. 766; American Surety Co. *v.* Pauly (1898) 170 U. S. 133, 144.

[1]See 1 Morawetz, Private Corporations, (2nd ed.) 24; Pinney *v.* Nelson (1901) 183 U. S. 144.

[2]This relation cannot be considered strictly contractual, for it has attributes which are not explainable on any theory of contract. See Hohfeld, Stockholders' Individual Liability, 9 COLUMBIA LAW REVIEW 285, 309 *et seq.;* Crippen *v.* Laighton (1899) 69 N. H. 540; Hancock Bank *v.* Farnum (1898) 20 R. I. 466, reversed (1900) 176 U. S. 640.

[3]Bank of Augusta *v.* Earle (1839) 38 U. S. 519.

[4]Latimer *v.* State Bank (1897) 102 Ia. 162.

[5]Corning *v.* McCullough (1847) 1 N. Y. 47; see Hohfeld, *op. cit.,* 305, n. 48.

[6]Whitman *v.* Bank (1900) 176 U. S. 559; Starkweather *v.* Am. Bible Society (1874) 72 Ill. 50.

acceptance of this formula, the courts have reached widely different results in attempting to apply it in the field of the conflict of laws.[7]

The conclusion just reached, however, that a shareholder's individual liability to corporate creditors is no less contractual because enlarged by statute law, indicates that the rules applicable to contracts must be held to govern the extra-territorial effect of the liability under discussion, as they admittedly would in the absence of such statute. Whatever of consensuality, then, exists between the corporation and creditor, is to be found in the conception that the contract of incorporation constitutes at the same time an offer to assume the obligations imposed by the law of the domicil, be they great or small, for the benefit of any person dealing with the corporation, in consideration of his so dealing.[8] Thus a corporate agent in a foreign state is authorized to bind the shareholders individually by this very offer, and none other, and it is surely fair in the ordinary case that the creditor, as well as the stockholders, should be held to have contracted with a view to the law of the domicil as embodied in this offer, and should be debarred from relying on the law of his own sovereignty, for he was put on notice of possible restrictions in the agent's authority by the very fact that he was acting for a foreign corporation. What law will govern a contract depends, in the absence of express designation, not so much upon the actual intention of either party, as upon what the parties must be presumed as reasonable men to have intended.[9] The logic of this doctrine, furthermore, probably demands that both the residence of the shareholder, and his status as an original corporator or subsequent purchaser of stock, should be immaterial. But in practice it has been laid down, at least in the case of a mere buyer of stock, that the courts of no country will trammel dealing in stocks by holding one of its own citizens to knowledge and contractual acceptance of liabilities provided in the general law of the domicil of the foreign corporation.[10]

The recent case of *Thomas* v. *Matthieson* (C. C. A. 2nd Cir. 1911) 192 Fed. 495, illustrates a further related step in the problem here presented. A creditor's action was brought against a New York stockholder of an Arizona corporation, formed for doing business in California, where the debt was incurred. By statute in the latter State, stockholders were subject to individual liability, while the common law rule prevailed in Arizona; and an express charter provision repudiated such individual liability and invoked the Arizona law. An expressed design to do business in a particular State is held to subject contracts there made to the *lex loci contractus;*[11] but in the absence of such an expression in the charter, or where, as in the principal case, there

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[7]There is one class of decisions holding this liability to be purely statutory and therefore strictly local, Crippen *v.* Laighton *supra;* Hancock Bank *v.* Farnum *supra,* in lower court, while another line of cases deems it to be essentially contractual and transitory. Whitman *v.* Bank *supra;* Hancock Bank *v.* Farnum (1900) 176 U. S. 640; Hohfeld, *op. cit.,* 315, n. 76.

[8]1 Morawetz, *op. cit.,* 24; 2 *id.* 870.

[9]Hohfeld, *op. cit.,* 503, n. 24, 504.

[10]Copin *v.* Adamson (1874) L. R. 9 Exch. 345. It is very probable, however, that the more liberal and continually broadening view of comity prevalent as between sister States would in this country require an opposite result.

[11]Pinney *v.* Nelson *supra.*

is an expression of a contrary intent, it would seem that there could be no presumption in reason and fairness except that the parties intended their agreement to be governed by the law of the corporate domicil.[12]

RIGHT OF PARTY TO IMPEACH WITNESS CALLED BY HIMSELF.—The rule that one cannot impeach his own witness undoubtedly originated in the duties of the early Anglo-Saxon compurgators who were chosen by each litigant to vouch for his cause.[1] The success of his case thus depended upon their credibility and their impeachment would have meant his defeat. But under the modern theory of evidence as a method of bringing facts to the knowledge of the court or jury, the idea that a party guarantees the trustworthiness of his witnesses, though often advanced even now as a reason for the continuance of the rule,[2] is contrary to the fact. A litigant nowadays has no unlimited choice of witnesses. On the contrary, he must take those who know the facts upon which he intends to rely, whatever their character, and the summoning of persons known to be unreliable, or who are likely to give testimony to some extent adverse, may therefore often be necessary and entirely consistent with good faith.[3] It is widely established, indeed, that in cases where a party is under a legal duty to summon certain witnesses, he may impeach them, since he had no choice;[4] but, as just suggested, necessity may equally restrict his choice and should lead to the same result.

This historical reason having thus long since lost its force, it remains to inquire if the rule can find support to-day. It is clear, at least, that its abrogation could afford no greater opportunities for collusion than now exist,[5] but it has been urged that if an attack upon one's own witnesses were allowed, they might be coerced into giving any testimony desired.[6] It would seem, however, that to give to one party an unlimited right of impeachment while denying it to the other, as in the recent New York case of *Power* v. *Brooklyn Heights Ry.* (1912) 40 N. Y. L. J. No. 126,[7] might well induce a witness to favor the

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[12]Risdon Iron Works *v.* Furness L. R. [1905] 1 K. B. 304, aff'd L. R. [1906] 1 K. B. 49.

[1]Wigmore, Evidence, § 896; 1 Pollock & Maitland, Hist. of English Law, 139, 140.

[2]Pollock *v.* Pollock (1877) 71 N. Y. 137; Comw. *v.* Hudson (Mass. 1858) 11 Gray 64.

[3]Brooks *v.* Weeks (1877) 121 Mass. 433.

[4]Denneth *v.* Dow (1840) 17 Me. 19; Wigmore, Evidence, § 917; Greenleaf, Evidence, (16th ed.) § 443. At one time a party was not allowed to introduce evidence even on a material point for the purpose of contradicting other evidence given by one of his witnesses, but this is universally allowed now even though the effect is to impeach his own witness. Wigmore, Evidence, § 897; Bradley *v.* Ricardo (1831) 8 Bing. 57; Starkie, Evidence, (10th Am. ed.) *244.

[5]Wright *v.* Beckett (1838) 1 M. & Rob. 414.

[6]Wigmore, Evidence, § 899.

[7]The rule that in case of surprise a party may cross-examine his own witness as to prior contradictory statements, but may not prove them by other evidence, obtains in some jurisdictions, while other jurisdictions allow such statements to be proved by extrinsic testimony. Chase's Stephen's Digest, 330, 2nd footnote.